

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

August 28, 2009

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Contested Case Request Regarding the Mauna Kea Comprehensive Management Plan

PETITIONERS: Mauna Kea Anaina Hou
The Sierra Club-Hawaii Chapter
The Royal Order of Kamehameha I
Kahea
Dwight J. Vicente
Clarence Kukauakahi Ching

LANDOWNER: State of Hawaii

LOCATION: Mauna Kea, Hawaii
TMKs: (3) 4-4-015:009 & 012

SUBZONE: Resource

BACKGROUND:

The Mauna Kea Comprehensive Management Plan (CMP) was developed by the University of Hawaii (UH) for the Mauna Kea Science Reserve which encompasses 11,288 acres of State land leased to the UH Institute for Astronomy under General Lease S-4191; the mid-level facilities at Hale Pohaku that include support facilities for the observatories, encompassing ~19-acres under General Lease S-5529; and the Summit Access road that extends from Hale Pohaku to the boundary of the Science Reserve under Grant of Easement S-4697.

On April 9, 2009, the Board of Land and Natural Resources (BLNR) approved the University of Hawaii's Mauna Kea Comprehensive Management Plan subject to eight conditions that included the following:

- 1) That the University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility with the accompanying authorities to another entity within the University system, subject to the approval of the BLNR;
- 2) That within one year of the BLNR approval of the CMP, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following information:

- Status of the development of each sub plan;
 - Status of the development of each management action;
- 3) That the BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person), which shall include the items listed in condition No. 2;
 - 4) That within one year of the BLNR approval of the CMP, or the submission of a Conservation District Use Application, whichever occurs sooner, the University shall submit for review and approval the following sub plans:
 - A cultural resources management plan;
 - A natural resources management plan;
 - A decommissioning plan, including a financial plan; and
 - A public access plan;
 - 5) That amendments to the CMP shall be reviewed and approved first by the BOR, and second by the BLNR;
 - 6) That the BOR recognized that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea;
 - 7) That within one year of the BLNR approval of the CMP, or the submission of a Conservation District Use Application, whichever occurs sooner, the BOR or its authorized designee shall provide the BLNR (for review and approval) with a management and implementation framework, that has been authorized by the BOR, for project developments within UH Management Areas that is consistent with the specific management actions, conditions and policies of the CMP;
 - 8) That failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law. **(Exhibit 1)**

Oral requests at the April 8-9, 2009 Board meeting and timely written petitions requesting a contested case were received by the Department from Mauna Kea Anaina Hou (MKAH), the Sierra Club-Hawaii Chapter, the Royal Order of Kamehameha I (ROOK I), Kahea, Dwight J. Vicente and Clarence Kukauakahi Ching **(Exhibit 2, 3, 4, 5, 6 and 7)**.

RECEIVED PETITIONS

According to the petitions filed by ROOK I and MKAH on behalf of their members and Clarence Kukauakahi Ching, all assert that they "use Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the 'piko' or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies and conduction temple worship."

Additionally, ROOK I states that it “is an unincorporated association of Hawaiian individuals.” ROOK I asserts that its members practice traditional and customary native Hawaiian practices “within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas.” These practices include temple ceremonies at Pu’u Wekiu.

In his petition, Clarence Kukauakahi Ching asserts that he is a native Hawaiian cultural practitioner with genealogical ties to Mauna Kea. These practices include traversing Mauna Kea trails, gathering wood, fiber, and stone for kalaiwa’a (canoe building) and other “cultural works,” and collecting sacred waters for ritual and medicinal purposes.

In its petition, MKAH states that it “is an unincorporated association of individuals (Hawaiian and non-Hawaiian) throughout the island of Hawaii.” MKAH asserts that its members practice traditional and customary native Hawaiian practices “within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas.”

In its petition, the Sierra Club asserts that its members are residents of the island of Hawaii who, “regularly use Mauna Kea for hiking (including access and use of traditional Hawaiian trails of Mauna Kea), viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.”

In its petition, Kahea states that it is, “a long-standing advocate for the protection of the natural and cultural resources of Mauna Kea lands.” Kahea asserts that its members conduct traditional cultural and religious practices and recreational activities, such as hiking and stargazing on Mauna Kea.

In his petition, Dwight J. Vicente challenges the “usurpation by the 13 United States over crown and government lands” and seeks the reinstatement of “the Kingdom and damages.”

ANALYSIS

Pursuant to §91-1(5), of the Hawaii Revised Statutes, a contested case hearing is one where the “legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” A contested case is “required by law” if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if mandated by due process.¹

There is no statute or rule calling for a contested case hearing in the context of the Board’s approval of the CMP.

Nor do the due process clauses of the state and federal constitutions provide a basis for a contested case hearing. Hawaii’s courts have developed a two-step analysis to determine if a claimant is entitled to a due process hearing. First, the court looks at whether the particular interest is “property” within the meaning of the due process clauses of the federal and state

¹ The Fourteenth Amendment to the United States constitution provides, in part, “nor shall any state deprive any person of life, liberty, or property, without due process of law.” Article I, Sec. 4 of the Hawaii Constitution provides, in part, “[n]o person shall be deprived of life, liberty or property without due process of law.”

constitutions. Second, the court determines what specific procedures are required to protect the interest asserted.²

“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”³

In this instance, Petitioners cannot show a property interest in the CMP or that the CMP will affect any property in which Petitioners have an interest.

The CMP provides UH with a tool for agency planning and management of lands over which it has assumed control. Specifically, Section 7 contemplates management actions for the UH management area atop Mauna Kea. The contested case requirements contained in Chapter 91, HRS, do not apply to UH’s internal management of its leased lands. To the extent the CMP is an internal management tool, it is not subject to a due process property interest by the public.

The CMP does not permit or authorize any new land use or development on Mauna Kea, including telescope projects. New projects will still be subject to all legal requirements including the environmental requirements of Chapter 343, HRS and Conservation District permitting requirements under HRS, §183C-6. Thus, the CMP will not affect any property in which Petitioners may have an interest.

Even if the CMP implicates property interests of Petitioners, which it does not, the present challenge to the CMP is not ripe for review. Withholding immediate review will not cause undue hardship on Petitioners, as the CMP does not alter their legal rights or obligations. Approval of the CMP does not guarantee any future development within the Mauna Kea Science Reserve or the other UH management areas.

The Board approved the CMP subject to UH’s submission of subplans for cultural resources management, natural resources management, decommissioning of telescopes, public access, and a management and implementation framework for the development of projects that are consistent with the specific management actions, conditions and policies of the CMP-all of which, have yet to be submitted. A contested case at this juncture would interfere with UH’s ability to complete its subplans and implementation framework.

The CMP may be subject to challenge at a later date, during the course of conservation district permit application proceedings as CMP revision could be required for new development. Thus, there is no reason for allowing a challenge to go forward now.

As such, the Board is not required by law to conduct a contested case hearing on the petitions.⁴

² Alejado v. City & County of Honolulu, 89 Haw. 221, 226-27, 971 P.2d 310, 315-16 (Haw. App. 1999).

³ Id., 89 Haw. at 227, 971 P.2d at 316 (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)).

⁴ Pursuant to HAR, §13-1-29.1, the Board without a hearing may deny a request for a contested case “when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.”

RECOMMENDATION:

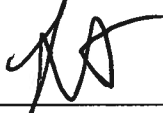
That the Board of Land and Natural Resources deny the requests for a contested case in regards to the Mauna Kea Comprehensive Management Plan by Mauna Kea Anaina Hou (MKAH), the Sierra Club-Hawaii Chapter, the Royal Order of Kamehameha I (ROOK I), Kahea, Dwight J. Vicente and Clarence Kukauakahi Ching.

Respectfully submitted,



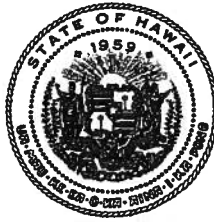
K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



Laura H. Thielen, Chairperson
Board of Land and Natural Resources

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT

ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

APR 15 2009

Mr. David McClain, President
University of Hawaii
2444 Dole Street, Bachman Hall
Honolulu, Hawaii 96822

Dear President McClain:

Subject: Mauna Kea Comprehensive Management Plan

This is to inform you that on April 9, 2009, the Board of Land and Natural Resources (BLNR) approved the University of Hawaii's Mauna Kea Comprehensive Management Plan (CMP), subject to the following conditions:

- 1) That the University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility with the accompanying authorities to another entity within the University system, subject to the approval of the BLNR;
- 2) That within one year of the BLNR approval of the CMP, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following information:
 - Status of the development of each sub plan;
 - Status of the development of each management action;
- 3) That the BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person), which shall include the items listed in condition No. 2;
- 4) That within one year of the BLNR approval of the CMP, or the submission of a Conservation District Use Application, whichever occurs sooner, the University shall submit for review and approval the following sub plans:
 - A cultural resources management plan;
 - A natural resources management plan;
 - A decommissioning plan, including a financial plan; and
 - A public access plan;
- 5) That amendments to the CMP shall be reviewed and approved first by the BOR, and second by the BLNR;

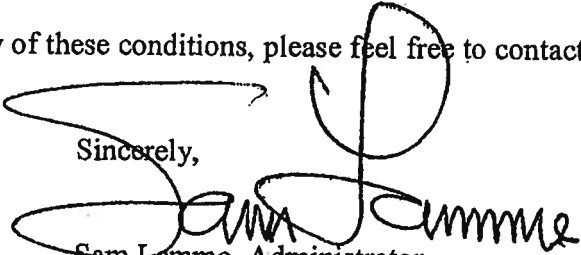
EXHIBIT 1

- 6) That the BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea;
- 7) That within one year of the BLNR approval the CMP, or the submission of a Conservation District Use Application, whichever occurs sooner, the BOR or its authorized designee shall provide the BLNR (for review and approval) with a management and implementation framework, that has been authorized by the BOR, for project developments within UH Management Areas that is consistent with the specific management actions, conditions and policies of the CMP;
- 8) That failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law.

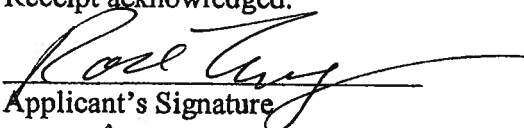
Please have the BOR's authorized designee acknowledge receipt of this approval with the above noted conditions, in the space provided below. Please sign two copies. Retain one and return the other within thirty (30) days.

Should you have any questions on any of these conditions, please feel free to contact me at 587-0377.

Sincerely,


Sam Lemmo, Administrator
Office of Conservation and Coastal Lands

Receipt acknowledged:


Applicant's Signature

Date

June 2, 2009

c: Chairperson, Board Members
Hawaii District Land Agent
Historic Preservation Division
NARS
Kuiwalu
OMKM

PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

1. **Name:** Mauna Kea Anaina Hou **Phone:** (808) 968-7660 and (808) 333-2869
2. **Address:** Mauna Kea Anaina Hou
P.O. Box 5864
Hilo, Hawai'i 96720
3. **Attorney:** Pro se.
4. **Address:** N/A
5. **Subject Matter:** Proposed BLNR approval and adoption of January 2009 University of Hawai'i Comprehensive Management Plan for Mauna Kea
6. **Date of public hearing / Board meeting:** Wednesday, April 8, 2009 and Thursday April 9, 2009, Hilo Hawaiian Hotel, Hilo, Hawai'i
7. **Legal authority under which hearing, proceeding or action is being made:**
HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**
 - a. **Tax Map Key Numbers:** 4-4-15:09 & 12, Mauna Kea, Hamakua, Hawai'i
 - b. **Background**

In April 2009, the State's Board of Land and Natural Resources (BLNR), held a public hearing and Board meeting over two days (4/8/09-4/9/09) at the Hilo Hawaiian Hotel, Hilo Hawai'i. On April 8, 2009 (pm) Ms. Kealoha Pisciotto, President, Mauna Kea Anaina Hou (MKAH) presented testimony and concluded with a verbal request for a Contested Case Hearing (HRS chapter 91). She addressed BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwlau Inc.).

On April 9, 2009, after the close of public comment, BLNR went into executive session with its legal counsel. The Board emerged from its executive session and proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the

EXHIBIT 2

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OFFICE OF CONSERVATION
AND COASTAL LANDS
2009 APR 20 A 11:08 AM
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):.

1. The University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- public access
- natural resources
- cultural resources
- decommissioning (including financing and bonds for restoration)

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

c. Related Legislative Action

The UH seeks (1) BLNR approval and adoption of the UH CMP; and, separately, (2) legislative approval of HB1174, SD2 (2009) Relating to the University of Hawaii which would grant UH rule making authority over the Mauna Kea lands UH leases under BLNR's General Lease No. S-4191. H.B.1174, SD2 directly relates to and will impact BLNR's review and adoption of the UH CMP. The UH CMP (page 7-35) expressly states, "Many of the considerations described in this plan can not be implemented without

rule making authority.” The UH CMP conditions are specifically dependant upon the passage of H.B. 1174, SD2 for implementation. The UH CMP combined with H.B. 1174 (if approved) will directly impact petitioner MKAH’s legal rights, because both the UH CMP and the UH bill would expressly restrict Native Hawaiian traditional and customary practice, use, and access and impact sites. The UH CMP and H.B.1174 impact public access and other public uses.

d. Standing.

Mauna Kea Anaina Hou (MKAH) is an unincorporated association of individuals (Hawaiian and non-Hawaiian) throughout the island of Hawaii. MKAH is dedicated to protecting, preserving and perpetuating Native Hawaiian traditional and customary cultural, historic and religious practices, access and site (landscape) protection.

MKAH Members have been actively involved in protecting Mauna Kea’s natural and cultural resources since the late 1980s. . Kealoha Pisciotta, President of Mauna Kea Anaina Hou, continues to exercise her traditional and customary Hawaiian cultural and religious practices on Mauna Kea. Ms. Pisciotta and other MKAH members have family and genealogical ties to Mauna Kea.

BLNR granted MKAH standing in the previous Contested Case Hearing on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. MKAH was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).

MKAH Members exercise and will continue to exercise their traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. Many MKAH members are native Hawaiian, as defined in the Hawaii Admission Act, Section 4. These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the “piko” or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. MKAH members enjoy constitutionally protected traditional and customary native Hawaiian rights.

MKAH has an interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, separate from those of the general public. MKAH can and will provide information to assist decision-making on the UH CMP. To manage and expedite the Contested Case Hearing, MKAH will work jointly with other parties who share common interests to organize and make a single presentation addressing:.

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP and HB 1174 will impact land uses within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights include, but are not limited to:

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the "piko" or umbilical cord, and water collection in and from Lake Waiau;
- Traditional astronomy, cosmology, and navigation;
- Burial practices;
- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of kinolau images.
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR's jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi'ihonua and Humu'ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants DHHL a right of first refusal to waters from public lands. Many MKAH members are also HHCA beneficiaries.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising the private use of public trust lands, and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The UH failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) of the UH CMP.

The Wekiu. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their

endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP under review and adopted in by BLNR reference another UH BOR document called the UH 2000 Master Plan (UH 2000 MP). This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the BOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH CMP includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the CMP will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

9. The specific disagreement, denial or grievance with the above matter:

Traditional and Customary Rights of Hawaiians. Approval of the UH CMP will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP grants the UH and their designated agents the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. MKAH seek to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. One of the observatory tour guides also removed, desecrated and destroyed a family shrine of MKAH President on at least two separate occasions. To date the same site has been desecrated and destroyed at least seven times in all, the latest of which occurred just this year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea. Petitioner MKAH has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Petitioner MKAH has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have

generated for the trust. MKAH native Hawaiian members have been adversely affected by this conduct.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently assessed impacts, or to reduce or mitigate these impacts. Petitioner MKAH have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. "Carrying capacity;"
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

10. Outline of specific issues to be raised:

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai'i, University of*

Hawaii, Board of Land and Natural Resources, Civil No. 04-1-397 (appeal dismissed)?

- b. Whether BLNR unlawfully voted to approve the UH CMP after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings in Hilo prior to decision making (4/8/09-4/9/09)? Whether BLNR's approval violated both DLNR's own rules and due process?
- c. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- d. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- e. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- f. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- g. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- h. Whether the BLNR should have adopted the UH CMP before independently identifying, assessing, and implementing actions to protect Petitioner MKAH's constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?
- i. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for protecting natural resources of Mauna Kea and, particularly, for any observatory expansion beyond the observatory limits set in BLNR 1983-85 Management Plan? The 1983-85 Management Plan set a limit on the size, dimensions, and number of observatories and telescopes permitted atop Mauna Kea (i.e. carrying capacity of the Mauna Kea).
- j. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by

failing to follow the proper procedures and apply proper standards for the protection of those species.

k. Whether the BLNR improperly approved the UH CMP that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

11. Outline of basic facts:

The record in this matter to date is contained in the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed), and public documents on record in this proceedings. Those records are incorporated by reference here.

In brief, the expanded development and operation of Mauna Kea observatories at the summit have led to continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and destroyed cultural sites (including those of MKAH). The failure to genuinely prepare a master plan and to restrict and manage activities on Mauna Kea has led to, and will in the future lead even further to, an overuse and loss of the unique natural and cultural resources on the mountain

The CMP and UH bill (HB1174, SD2) are poorly conceived and inadequate efforts to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The January 2009 UH CMP is not such a plan. Nor can an ad hoc collection of "sub-plans" remedy its failure. There is no substitute for an integrated and fully considered plan. The CMP now before the Board must be rejected.

12. The relief or remedy to which you seek or deem yourself entitled:

That the BLNR:

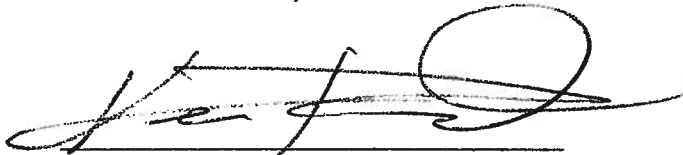
- a) REJECT AND NOT APPROVE OR ADOPT the January 2009 UH CMP;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of

Land and Natural Resources Hawaii Administrative Rules, chapter 13-5
for the Conservation District that meets the full scope, terms, and
conditions for a "comprehensive management plan" as required by law;

OR IN THE ALTERNATIVE,

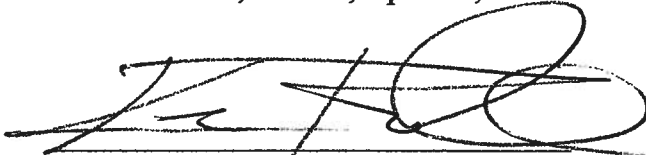
c) GRANT Petitioner MKAH standing in this proceeding and CONDUCT a
full contested case hearing on the proposed CMP

We thank you for your time and consideration,
In Aloha I remain,



Kealoha Pisciotto, President
Mauna Kea Anaina Hou

DATED: Hilo, Hawaii, April 17, 2009



Kealoha Pisciotto, Individually

enclosed check (#7701) for contested case hearing filing fee (\$100.00)

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

1. **Name:** Sierra Club, Hawai'i Chapter
2. **Address:** Sierra Club, Hawai'i Chapter
c/o Nelson Ho
[REDACTED]
Hilo, Hawai'i 96720

Phone: (808) [REDACTED]
(808) [REDACTED]

RECEIVED
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII
APR 20 11:44
DEPT. OF CONSERVATION
& COASTAL LANDS

Contacts for Sierra Club Hawai'i Chapter are Ms. Deborah J. Ward and Mr. Nelson Ho and their phone contacts are provided above.

3. **Attorney:** Not sure yet.
4. **Address:** N/A
5. **Subject Matter:** BLNR review and adoption of the University of Hawai'i's Comprehensive Management Plan, dated January 2009
6. **Date of public hearing/Board meeting:** Wednesday and Thursday, April 8 and 9, 2009, held at the Hilo Hawaiian Hotel, Hilo Hawai'i
7. **Legal authority under which hearing, proceeding or action is being made:**

HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**
- a. **Tax Map Key Numbers:** 4-4-15:09 & 12, Mauna Kea, Hamakua, Hawai'i
- b. **Background**

In April 2009, the State's Board of Land and Natural Resources (BLNR), held a public hearing and Board meeting over two days (4/8/09-4/9/09) at the Hilo Hawaiian Hotel, Hilo Hawai'i. During the public hearing Mr. Nelson Ho, presented testimony and concluded with a verbal request for a Contested Case Hearing (HRS chapter 91). He addressed BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwalu Inc.).

EXHIBIT 3

On April 9, 2009, after the close of public comment, BLNR went into executive session with its legal counsel. The Board emerged from its executive session and proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. The University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- public access
- natural resources
- cultural resources
- decommissioning (including financing and bonds for restoration)

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

c. Related Legislative Action

The UH seeks (1) BLNR approval and adoption of the UH CMP; and, separately, (2) legislative approval of HB1174, SD2 (2009) Relating to the University of Hawaii

which would grant UH rule-making authority over the Mauna Kea lands UH leases under BLNR's General Lease No. S-4191. H.B.1174, SD2 directly relates to and will impact BLNR's review and adoption of the UH CMP. The UH CMP (page 7-35) expressly states, "Many of the considerations described in this plan can not be implemented without rule making authority." The UH CMP conditions are specifically dependant upon the passage of H.B. 1174, SD2 for implementation. The UH CMP combined with H.B. 1174 (if approved) will directly impact petitioner's legal rights, because both the UH CMP and the UH bill would expressly restrict access, the ecosystem protection and view planes and SC members spiritual contemplation and enjoyment of Mauna Kea. The UH CMP and H.B.1174 impact public access and other public uses.

d. Standing

Sierra Club, Hawaii Chapter, (SC) is the local chapter of the national Sierra Club, one of America's oldest grassroots environmental organization, with 1.3 million members joined together to protect and preserve natural ecosystems and work against degradation from a variety of causes. Members of the Sierra Club, Hawaii Chapter (Sierra Club) include residents of Hawai'i Island who regularly use Mauna Kea for hiking (including access and use of traditional Hawaiian trails of Mauna Kea), viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.

Sierra Club was granted standing by BLNR in a previous contested case hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. SC was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

SC member Mae Mull worked with Hawai'i Island Mayor Herbert Matayoshi and State Governor George Ariyoshi in the 1970's and early 1980's to get the DLNR aware of the community's concerns about expanding (unpermitted) telescope development, which led to the DLNR's development of the Science Reserve Complex Development Plan and management plan, approved by the BLNR in 1985. Sierra Club member Nelson Ho, and others in the 1980's participated in communication with DLNR through letters and testimony about MK management throughout the 1980's and 1990's. He appeared before the BLNR to speak on Mauna Kea matters in 1995 when that plan was adopted. He was concerned about the urbanization and industrialization of the summit and the amount of observatory trash being blown over that stark landscape.

At the request of the Legislative Auditor, Ho and Deborah Ward participated in discussions for the audits conducted in 1998 and 2005. In 1998 Ho was appointed by UH President Kenneth Mortimer to help draft their UH Master Plan, which in turn became the UH 2000 Master Plan, a UH Board of Regents (BOR) approved document that authorized the Office of Mauna Kea Management(OMKM). Ward has been an active member of the OMKM Environment Committee (EC) since 2000. Other EC members

have included Rob Pacheco, Reggie David, Hannah Springer, Don Thomas, Jim Kauahikaua, Jim Juvik, Lisa Hadway, Julie Leialoha, Fred Stone, Frank Howarth, Susan Cordell, and several others, many of whom are SC members. Ward and others were tasked to draft the Environment Committee white paper that eventually led to the decision to hire a planning consulting firm to draft a natural resources management plan for OMKM. Numerous members of the Sierra Club, including Ward, Ho, Cory (Martha) Hardin, Charles Stanton, and others have attended virtually every meeting of the UH-appointed Mauna Kea Management Board, (even when public testimony was not allowed until the end of a meeting, after the vote was taken.)

Ho and Ward, representing Sierra Club, were members of a hui of participants, including Mauna Kea Anaina Hou, Royal Order of Kamehameha I, and native Hawaiian practitioners, who took part in successful litigation (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397) to overturn the Department of Land and Natural Resources permit for Keck Outrigger telescope development, due to the absence of a current comprehensive development plan to address multiple uses on Mauna Kea. When the DLNR and the University appealed Third Circuit Court Judge Glenn Hara's ruling requiring a comprehensive management plan, the issue went before the Intermediate Court of Appeals, and the DLNR appeal was subsequently withdrawn, so the ruling stands.

BLNR granted SC standing in the previous Contested Case Hearing on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. SC was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).

SC has an interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, separate from those of the general public. SC can and will provide information to assist decision-making on the UH CMP. To manage and expedite the Contested Case Hearing, SC will work jointly with other parties who share common interests to organize and make a single presentation addressing:

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR's jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of

such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa Military Training Area, and Mauna Kea State Park.

Section 5(f) Public Trust Land Revenues. Are meant to benefit Hawaiians and the general public. Petitioners have an interest in the Trustee's conduct to protect the trust resources, to prevent waste, to secure trust revenues arising the private use of public trust lands, and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee. SC members include Hawaiian and general public beneficiaries of the Public Trust Land Revenues.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The UH failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) of the UH CMP.

The *Wekiu*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

The UH CMP under review and adopted in by BLNR reference another UH BOR document called the UH 2000 Master Plan (UH 2000 MP). This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the BOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH CMP includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received

substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

National Environmental Policy Act. Press statements to the contrary, actions covered by the CMP will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

9. The specific disagreement, denial or grievance with the above matter:

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea. SC has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

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11. Outline of basic facts:

The record in this matter to date is contained in the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed), and public documents on record in this proceedings. Those records are incorporated by reference here.

In brief, the expanded development and operation of Mauna Kea observatories at the summit have led to continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and destroyed cultural sites (including those of SC). The failure to genuinely prepare a master plan and to restrict and manage activities on Mauna Kea has led to, and will in the future lead even further to, an overuse and loss of the unique natural and cultural resources on the mountain

The CMP and UH bill (HB1174, SD2) are poorly conceived and inadequate efforts to arrest this deterioration. A broad based and properly vetted management plan is essential to the future of Mauna Kea. The January 2009 UH CMP is not such a plan. Nor can an ad hoc collection of "sub-plans" remedy its failure. There is no substitute for an integrated and fully considered plan. The CMP now before the Board must be rejected.

12. The relief or remedy to which you seek or deem yourself entitled:

That the BLNR:

- a) REJECT AND NOT APPROVE OR ADOPT the January 2009 UH CMP;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;

OR IN THE ALTERNATIVE,

- c) GRANT Petitioner SC standing in this proceeding and CONDUCT a full contested case hearing on the proposed CMP.

DATED: Hilo, Hawaii, April 17, 2009.

Payment for CCH Stand petition in the amount of \$100 is enclosed with this document.


Deborah J. Ward, Sierra Club, Hawai'i Chapter


Nelson Ho, Sierra Club, Hawai'i Chapter

PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

1. **Name:** Royal Order of Kamehameha I, **Phone:** (808) [REDACTED]
Moku o Mamalahoa, Heiau Helu 'Elua
2. **Address:** Royal Order of Kamehameha I
c/o Paul K. Neves
[REDACTED]
Hilo, Hawai'i 96720
3. **Attorney:** Not sure yet.
4. **Address:** N/A
5. **Subject Matter:** BLNR review and adoption of the University of Hawai'i's Comprehensive Management Plan
5. **Date of public hearing/Board meeting:** Wednesday and Thursday, April 8 and 9, 2009, at the Hilo Hawaiian Hotel, Hilo Hawai'i
5. **Legal authority under which hearing, proceeding or action is being made:**

HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31

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STATE OF HAWAII

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8. Nature of your specific legal interest in the above matter, including tax map key of property affected:

- a. **Tax Map Key Numbers:** 4-4-15:09 & 12, Mauna Kea, Hamakua, Hawai'i
- b. **Background**

In April 2009, the State's Board of Land and Natural Resources (BLNR), held a public hearing and Board meeting over two days (4/8/09-4/9/09) at the Hilo Hawaiian Hotel, Hilo Hawai'i. During the public hearing Ali'i Sir Paul K. Neves, Ali'i 'Aimoku of the Royal Order of Kamehameha I, Moku O Mamalahoa, Heiau Helu 'Elua (ROOK I) presented testimony and concluded with a verbal request for a Contested Case Hearing (HRS chapter 91). He addressed BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwlau Inc.).

On April 9, 2009, after the close of public comment, BLNR went into executive session with its legal counsel. The Board emerged from its executive session and proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):.

1. The University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- public access
- natural resources
- cultural resources
- decommissioning (including financing and bonds for restoration)

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

c. Related Legislative Action

The UH seeks (1) BLNR approval and adoption of the UH CMP; and, separately, (2) legislative approval of HB1174, SD2 (2009) Relating to the University of Hawaii which would grant UH rule making authority over the Mauna Kea lands UH leases under BLNR's General Lease No. S-4191. H.B.1174, SD2 directly relates to and will impact BLNR's review and adoption of the UH CMP. The UH CMP (page 7-35) expressly states, "Many of the considerations described in this plan can not be implemented without rule making authority." The UH CMP conditions are specifically dependant upon the passage of H.B. 1174, SD2 for implementation. The UH CMP combined with H.B. 1174 (if approved) will directly impact petitioner ROOK I's legal rights, because both the UH CMP and the UH bill would expressly restrict Native Hawaiian traditional and customary practice, use, and access and impact sites. The UH CMP and H.B.1174 impact public access and other public uses.

d. Standing

The Royal Order of Kamehameha I, Moku o Mamalahoa, Heiau Helu `Elua (ROOK I), is an unincorporated association of Hawaiian individuals. The Royal order of Kamehameha I of which ROOK I is a part, was created well over 130 years ago. Its charter dates back to the 1860's. The Royal order was formed to instill loyalty and patriotism to the Hawaiian Kingdom and to uphold the protocols of the traditional and customary Hawaiian leadership. Members of ROOK I have been actively involved exercising traditional and customary Native Hawaiian cultural and religious practice and ceremony and have consistently worked for greater natural and cultural resources protection of Mauna Kea since the 1990's.

Mr. Paul K. Neves, is Ali'i `Aimoku of the ROOKI representing Hamakua, Hilo, Puna and Ka'u districts of Hawai'i Island. He is also an individual that continues to exercise traditional and customary Hawaiian cultural and religious practice and he and other members of ROOK have family and genealogical ties to Mauna Kea and Haleakala.

ROOK I was granted standing by BLNR in a previous Contested Case Hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. ROOK I was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawaii, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

Members of ROOK I participate in many traditional and customary native Hawaiian practices within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas. However, ROOK I members have maintained and temple ceremony within the above area land areas, including Pu'u Wekiu of Mauna Kea. ROOK I erected a ceremonial plate form on the Pu'u Wekiu many years ago and has to replace it on two separate occasions after it was desecrated and destroyed.

Many ROOK I members are native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. These rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, members of ROOK I enjoy constitutionally protected traditional and customary native Hawaiian rights.

ROOK I has interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, separate from those interests held by the General Public and can provide relevant information to help decision-making regarding the UH CMP. In order to help expedite the Contested Case Hearing Process, ROOK I is willing to work with any other parties so that where common and shared interests between parties exist we will work to file jointly.

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP and HB 1174 will impact land uses within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which

is recognized statutorily in HRS § 1-1. These rights include, but are not limited to:

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the “piko” or umbilical cord, and water collection in and from Lake Waiau;
- Traditional astronomy, cosmology, and navigation;
- Burial practices;
- Conducting temple ceremony on Mauna Kea
- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of kinolau images.
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR’s jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii’s people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai’i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi’ihonua and Humu’ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants DHHL a right of first refusal to waters from public lands. Many ROOK I members are also HHCA beneficiaries.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising the private use of public trust lands, and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The UH failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) of the UH CMP.

The Wekiu. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP under review and adopted in by BLNR reference another UH BOR document called the UH 2000 Master Plan (UH 2000 MP). This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the BOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH CMP includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the CMP will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

"Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);

"Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);

"The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);

- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action

temporary or by breaking it down into small component parts," id. § 1508.27(b)(7);

"The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," id. § 1508.27(b)(8);

Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b) (10).

9. The specific disagreement, denial or grievance with the above matter:

Traditional and Customary Rights of Hawaiians. Approval of the UH CMP will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP grants the UH and their designated agents the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. ROOK I seek to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. One of the observatory tour guides also removed, desecrated and destroyed a family shrine of MKAH President on at least two separate occasions.

The ROOK I erected a ceremonial platform (lele) on Pu'u Wekiu, the lele and stone alter beneath containing associated burial objects of Hawaiians has been desecrated and destroyed on at least two separate occasions It was just this year again destroyed. Members of ROOK I have also helped Ms. Pisciotta rebuild and rededicate her family shrine on numerous occasions, and to date the same site has been desecrated and destroyed at least seven times in all, the latest of which occurred just this year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born

and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea. Petitioner ROOK I has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Petitioner ROOK I has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust. ROOK I native Hawaiian members have been adversely affected by this conduct.

The Wekiu. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioner ROOK I have an interest in its protection, based on their members' cultural and religious beliefs, which requires

them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently assessed impacts, or to reduce or mitigate these impacts. Petitioner ROOK I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

"Carrying capacity;"

The number of astronomy facilities and telescopes which may be constructed on the summit;

Time lines for proposed activities

Cumulative impacts on specific natural resources;

Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);

No updated hydrological study;

No energy consumption study

9. Outline of specific issues to be raised:

a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed)?

b. Whether BLNR unlawfully voted to approve the UH CMP after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings in Hilo prior to decision making (4/8/09-4/9/09)? Whether BLNR's approval violated both DLNR's own rules and due process?

c. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of

DLNR/BLNR?

- d. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- e. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- f. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- g. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- h. Whether the BLNR should have adopted the UH CMP before independently identifying, assessing, and implementing actions to protect Petitioner ROOK I's constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?
- i. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for protecting natural resources of Mauna Kea and, particularly, for any observatory expansion beyond the observatory limits set in BLNR 1983-85 Management Plan? The 1983-85 Management Plan set a limit on the size, dimensions, and number of observatories and telescopes permitted atop Mauna Kea (i.e. carrying capacity of the Mauna Kea).
- j. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
- k. Whether the BLNR improperly approved the UH CMP that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important

cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

11. Outline of basic facts:

The record in this matter to date is contained in the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed), and public documents on record in this proceedings. Those records are incorporated by reference here.

In brief, the expanded development and operation of Mauna Kea observatories at the summit have led to continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and destroyed cultural sites (including those of MKAH and ROOK I). The failure to genuinely prepare a master plan and to restrict and manage activities on Mauna Kea has led to, and will in the future lead even further to, an overuse and loss of the unique natural and cultural resources on the mountain

The CMP and UH bill (HB1174, SD2) are poorly conceived and inadequate efforts to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The January 2009 UH CMP is not such a plan. Nor can an ad hoc collection of "sub-plans" remedy its failure. There is no substitute for an integrated and fully considered plan. The CMP now before the Board must be rejected.

12. The relief or remedy to which you seek or deem yourself entitled:

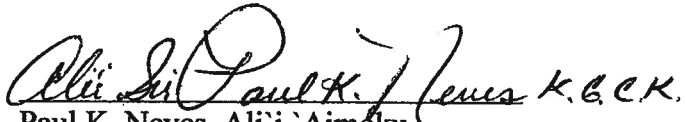
That the BLNR:

- a) REJECT AND NOT APPROVE OR ADOPT the January 2009 UH CMP;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;


OR IN THE ALTERNATIVE,

c) GRANT Petitioner ROOK I standing in this proceeding and CONDUCT a full contested case hearing on the proposed CMP

We thank you for your time and consideration,
In Aloha I remain,


Paul K. Neves, Ali'i `Aimoku

Royal Order of Kamehameha I, Moku o Mamalahoa, Heiau Helu `Elua


Paul K. Neves, Individually

DATED: Hilo, Hawaii, April 17, 2009

check # 7702 enclosed



KAHEA

THE HAWAIIAN-ENVIRONMENTAL ALLIANCE

PROTECTING

NATIVE HAWAIIAN

CUSTOMARY &

TRADITIONAL RIGHTS

AND OUR FRAGILE

ENVIRONMENT

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kahea-alliance@hawaii.rr.com

KAHEA: the Hawaiian-Environmental Alliance is a non-profit 501(c)3 working to protect the unique natural and cultural resources of the Hawaiian islands. KAHEA translates to english as "the call."

To: Hawai'i Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawa'i 96813

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Date: Friday, April 17, 2009

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Re: KAHEA's request for a contested case hearing on the Board's April 9, 2009 approval of the University of Hawaii's Comprehensive Management Plan for lands on Mauna Kea

Please accept this timely petition for a contested case hearing requested by KAHEA: The Hawaiian-Environmental Alliance (hereinafter "KAHEA" or "Petitioner") regarding the Board of Land and Natural Resources approval of the University of Hawaii's "Comprehensive Management Plan" on April 9, 2009 in Hilo.

This contested case hearing is requested pursuant to Hawaii Revised Statutes Chapter 91 and Hawaii Administrative Rules Section 13-1.

I. FACTUAL BACKGROUND

On April 9, 2009, the Board of Land and Natural Resources (hereinafter "Land Board") unanimously approved the University of Hawaii's (hereinafter "University") proposed "comprehensive management plan" for certain lands on Mauna Kea. The Land Board decision was premised on the University satisfying several additional conditions, including the completion of several subplans.

The University brought its proposal to the Land Board in an effort to satisfy the Third Circuit Court's ruling in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, Civil No. 04-1-397, January 2007. The court ruled that a comprehensive management plan is necessary before the Land Board may consider a permit for any uses or activities on the summit. Based on the issues raised by KAHEA and other petitioners during the public hearing process, it is not clear that the plan satisfies the court's order.

The Third Circuit Court decision arose from the Land Board's failure to abide by the requirements of H.A.R. 13-1 requiring a management plan prior to approving the University's proposal to build six Outrigger telescopes on the summit of Mauna Kea. The

University's 40-year history of telescope construction on the summit has been a source of significant controversy because it has led to the desecration of cultural sites, contamination of the ground soil, and loss of significant habitat for rare and endemic species.

II. A CONTESTED CASE HEARING IS WARRANTED

The Department has a constitutional, statutory and regulatory obligation to protect and manage state lands, especially those set aside as conservation districts. Mauna Kea is one of the most important conservation districts in the state. Implementing the management protections required by DLNR regulations has raised considerable controversy, including extensive public hearings over the last 15 years and major civil litigation. For its decision made on April 9, 2009, the Land Board considered two full days of public testimony before taking action on the University's proposed plan for Mauna Kea.

Contested case hearings are the opportunity for members of the public with specific and unique interests distinct from the general public to address issues and raise concerns regarding Land Board decisions. Given the long-standing controversy surrounding management activities on the summit of Mauna Kea and the Department's unique legal obligations to implement management protections for the conservation district of Mauna Kea, a contested case hearing should be held to resolve the significant questions of fact and law raised by KAHEA and other petitioners during the public testimony phase of decision-making.

Specific issues that should be addressed in this contested case include, but are not limited to:

- Whether the Department, not its lessee or a third party, is required to prepare, and Land Board adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court's judgment and final order in Mauna Kea et al. v. State of Hawai'i. University of Hawaii. Board of Land and Natural Resources, Civil No. 04-1-397, January 2007.
- Whether the Land Board unlawfully voted to approve the University's proposal after KAHEA and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings in Hilo prior to decision making (4/8/09-4/9/09).
- Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the University to file as applicant, instead of the Department/Land Board.
- Whether a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea was required.

- Whether the Land Board should have addressed the eight (8) criteria required by the Land Board's regulations?
-
- Whether the conditions in the General Lease GL S-4191 to the University have been violated?
- Whether the Land Board violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- Whether the Land Board should have adopted the University's plan before independently identifying, assessing, and implementing actions to protect the constitutionally-based traditional and customary native Hawaiian rights practiced on Mauna Kea.
- Whether the Land Board should have adopted the UH CMP before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue.
- Whether the Land Board must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for protecting natural resources of Mauna Kea and, particularly, for any observatory expansion beyond the observatory limits set in BLNR 1983-85 Management Plan? The 1983-85 Management Plan set a limit on the size, dimensions, and number of observatories and telescopes permitted atop Mauna Kea (i.e. carrying capacity of the Mauna Kea).
- Whether the Land Board is violating state and federal laws that protect species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
- Whether the Land Board improperly approved the University's plan that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites.

III. KAHEA HAS STANDING TO PARTICIPATE IN THIS CONTESTED CASE

As a long-standing advocate for the protection of the natural and cultural resources of Mauna Kea lands, KAHEA has an interest distinct from the general public that warrants standing in this contested case proceeding.

The Hawai'i Administrative Rules identify three groups that "shall be admitted as a party": the petitioner, relevant government agencies, and "other persons who can show a substantial interest in the matter...." (HAR §13-1-31(a)(4)).

A. KAHEA has a substantial interest in this matter

Since 2001, KAHEA has supported the community's effort to uphold the laws that protect the sacred summit of Mauna Kea. KAHEA's Board and constituents include Native Hawaiian cultural practitioners, conservationists, scientists, and outdoor enthusiasts, all of whom are deeply invested in the effort to protect this public trust resource and uphold the laws that protect this important area. The well-being of the natural and cultural resources of Mauna Kea is essential to the ability of our members to engage in constitutionally protected, traditional cultural and religious practices, as well as statutorily protected recreational activities, such as hiking and star-gazing.

KAHEA asserts the rights of all Native Hawaiians to ensure Hawai'i's natural resources and the cultural beliefs and traditional practices associated with them are fully protected. KAHEA is led by and works on behalf of Native Hawaiians with constitutionally recognized rights to access and protect Mauna Kea. See, Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5. In this contested case proceeding, KAHEA will present its genuine concerns for the protections of these legitimate interests that are not shared by the general public as a whole.

The Supreme Court of Hawai'i has stated:

With regard to Native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." Our fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court.

See Ka Pa'akai o Ka'aina et al. v. Land Use Commission et al. 94 Haw. 31, 42, 7 P.3d 1068, 1079 (2000) (internal quotations and citations omitted).

In the same case, the Supreme Court of Hawai'i also noted:

"where the interests at stake are in the realm of environmental concerns[,] we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements."

Id. (internal quotations omitted).

KAHEA continues to advocate for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape

as apart of their traditional and customary cultural and religious practice. The environmental and Native Hawaiian concerns at issue in this contested case may be summarized as follows:

- **Public Trust Doctrine:** The conservation district of Mauna Kea is a public trust resource managed by the Department of Land and Natural Resources on behalf of and for the benefit of all people in Hawai'i (Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5). The Hawai'i Constitution specifically provides that "any person may enforce this right against any party, public or private, through appropriate legal proceedings..." (Hawai'i Const. Art. XI § 9).
- **Water Supplies:** The degradation of the watershed supply is a public health and safety issue. Mauna Kea's watershed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Current operations at the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource, which Petitioners have an interest in protecting. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea.
- **The *Wekiu*:** The insect known as the *Wekiu* is found in one place in the world - the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this insect violates state law requiring Land Board action to assure its survival. Since construction of telescope facilities on the summit began, the population samples of the *Wekiu* have declined by over 99%. Under HRS § 195D-4(b), the Land Board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. KAHEA has an interest in its protection, based on our members' cultural and religious beliefs, and commitment to protect Hawaii's natural resources.
- **Environmental Impact Review.** While the Land Board was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the Land Board has taken no affirmative action to independently accessed impacts, or to reduce or mitigate these impacts. For eight years, KAHEA has advocated for greater protection of the natural and cultural resources threatened by these impacts.
- **Traditional and Customary Rights of Hawaiians.** Approval of the University's plan for Mauna Kea will lead to interference with and/or denial of constitutionally protected rights held by Native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to cultural practitioner who sought to exercise religious, cultural and traditional rights.

Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented cultural practitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

- Desecration and Destruction of Cultural Sites. The University's plan for Mauna Kea as written gives the University the authority to determine the cultural "appropriateness" of Native Hawaiian practices, and where the University and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. In the past, University staff and their agents have repeatedly desecrated and destroyed cultural sites on the summit. The latest incident occurred in early 2009. KAHEA continues to protect and perpetuate the numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu, as well as the ceremonial practices associated with them.
- Burial Sites. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The Land Board has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.
- Section 5(f) Public Trust Land Revenue. The Land Board's disposition of public lands (sub-leasing and third party leasing to foreign entities) is subject to the trust provisions outlined in Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent is a breach of the trust and statutory duties owed to all beneficiaries. The Land Board and the State have forfeited substantial revenue that the observatories could have generated for the trust. The beneficiaries who are members of KAHEA have been adversely affected by this improper conduct.
- Failure to prepare a "Comprehensive" Management Plan as required by law. Despite its title, the University's "comprehensive management plan" is NOT comprehensive. The plan does not even begin to seriously address, *inter alia*, the following:
 - a. Numeric carrying capacity for construction activities affecting the conservation district;
 - b. The number of astronomy facilities and telescopes which may be constructed on the summit;
 - c. Time lines for proposed activities
 - d. Cumulative impacts on specific natural resources;
 - e. Relation of this plan to the University's 2000 Master Plan
 - f. Updated hydrological study;
 - g. Energy consumption study;
 - h. Hazardous materials and use plan

As a representative and advocate on behalf of the Native Hawaiian community, including current Native Hawaiian cultural practitioners, KAHEA's interests are unique from the general public. And because of KAHEA's on-going advocacy since 2001 for the protection of the Mauna Kea conservation district from uncontrolled construction, KAHEA is also an exceptional representative of the public's interest in protecting the resources of the summit from environmental harm.

B. The Effect Of A Decision In The Contested Case On KAHEA's Interests

This contested case proceeding addresses many of the long-standing issues surrounding the University's use of the summit of Mauna Kea for astronomy. The outcome of this case will likely have significant affect on the future interpretation and implementation of state laws and regulations regarding land use in conservation districts, leases for the use of state land, and the state's obligation to protect constitutionally recognized Native Hawaiian traditional and customary practices. The questions of law and fact presented in this case speak to the core purpose and proper implementation of Hawaii's natural resource and cultural preservation laws. As such, this contested case directly affects KAHEA's interests as a longstanding advocate for the protection of this public trust resource and as a Native Hawaiian-led organization committed to protecting traditional and cultural rights.

C. KAHEA'S Participation Will Serve The Public Interest And Ensure The Development Of A More Complete Record

As a longstanding and independent advocate for the proper protection of Hawai'i's public trust resources on the sacred summit of Mauna Kea, KAHEA is the proper party to raise the distinct issues outlined in this petition in the public's interest.

KAHEA has consistently provided critical information to the Land Board to assist Board members in making the best possible decisions about the management of the Mauna Kea. Over the years, KAHEA has developed its role in the community as an advocate and leader for the protection of Mauna Kea's public trust natural and cultural resources. As such, KAHEA has access to independent, expert analysis related to these issues.

Relevant and impartial information, such as this, is essential to an effective and efficient decision-making process.

III. CONCLUSION

KAHEA has an independent and substantial right to participate in this contested case proceeding as a party. KAHEA's participation will also give the public greater confidence in the legitimacy of the final ruling. While KAHEA's participation may slightly broaden the issues addressed in this case, doing so will not delay the proceeding and, in fact, will help to ensure the disposition is based on a complete record. KAHEA's participation will also serve the public interest by ensuring that the laws and regulations adopted to protect the sacred summit of Mauna Kea, as well as all conservation districts in Hawaii, are properly implemented and fully enforced, and that decisions about our public trust resources are made with transparency and full accountability.

Mahalo,



Ex. 5-7

Miwa Tamanaha
Executive Director

Marti Townsend.

Marti Townsend
Program Director

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. Name Dwight J. Vicente Phone [REDACTED] Fax [REDACTED]
2. Address [REDACTED] Dr. Hilo, H.I. 96720
Email Address _____
3. Attorney (if any) _____ Phone _____ Fax _____
4. Address _____
Email Address _____
5. Subject Matter: Mauna Kea C.M.P.
6. Date of Public Hearing/Board Meeting 4-8-2009
7. Legal authority under which hearing, proceeding or action is being made Queen
Kiliuekalani protest against U.S. Minister - Stevens Patent 1-17-1893
8. Nature of your specific legal interest in the above matter, including tax map key of
property affected: Land title is in the name of The Hawaiian
Kingdom
9. The specific disagreement, denial or grievance with the above matter: usurpation by
The 13 United States over crown and Government lands
Article 4 Sec. 3 clause 2, Northwest Ordinance 1787
10. Outline of specific issues to be raised: U.S. Constitution Article 3 Sec. 2, clause 2,
Article 4 Sec. 3 clause 2 and others
11. Outline of basic facts: Queen signed into Law the petition on 1-13-1893
U.S. and its citizens removed ^{PR} the Queen because of this,
violated Treaties
12. The relief or remedy to which you seek or deem yourself entitled: reinstate the
Kingdom and domains

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a
Contested Case hearing in the matter described above. Dated: 4-17-2009

EXHIBIT 6

All Rights Reserved
D.J. Vicente

PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

1. **Name:** Clarence Kukauakahi Ching **Phone:** (808) [REDACTED]
2. **Address:** [REDACTED]
Kamuela, Hawai'i 96743
3. **Attorney:** Not sure yet.
4. **Address:** N/A
5. **Subject Matter:** BLNR review and adoption of the University of Hawai'i's Comprehensive Management Plan dated January 2009
6. **Date of public hearing/Board meeting:** Wednesday and Thursday, April 8 and 9, 2009, at the Hilo Hawaiian Hotel, Hilo Hawai'i
7. **Legal authority under which hearing, proceeding or action is being made:**

HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including map of property affected:**
 - a. **Tax Map Key Numbers:** 4-4-15:09 & 12, Mauna Kea, Hamakua, Hawai'i
 - b. **Background**

In April 2009, the State's Board of Land and Natural Resources (BLNR), held a public hearing and Board meeting over two days (4/8/09-4/9/09) at the Hilo Hawaiian Hotel, Hilo Hawai'i. During the public hearing, I presented testimony and concluded with a verbal request for a Contested Case Hearing (HRS chapter 91), on behalf of myself as a Hawaiian cultural practitioner. I addressed BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwalu Inc.).

On April 9, 2009, after the close of public comment, BLNR went into executive session with its legal counsel. The Board emerged from its executive session and proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):.

1. The University of Hawaii Board of Regents (BOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- public access
- natural resources
- cultural resources
- decommissioning (including financing and bonds for restoration)

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

c. Related Legislative Action

The UH seeks (1) BLNR approval and adoption of the UH CMP; and, separately, (2) legislative approval of HB1174, SD2 (2009) Relating to the University of Hawaii which would grant UH rule making authority over the Mauna Kea lands UH leases under BLNR's General Lease No. S-4191. H.B.1174, SD2 directly relates to and will impact BLNR's review and adoption of the UH CMP. The UH CMP (page 7-35) expressly states, "Many of the considerations described in this plan can not be implemented without rule making authority." The UH CMP conditions are specifically dependant upon the passage of H.B. 1174, SD2 for implementation. The UH CMP combined with H.B. 1174

(if approved) will directly impact my legal rights, because both the UH CMP and the UH bill would expressly restrict Native Hawaiian traditional and customary practice, use, and access and impact sites. The UH CMP and H.B.1174 impact public access and other public uses.

d. Standing

I, Clarence Kukauakahi Ching, file this petition for contested case hearing as an individual Hawaiian cultural practitioner. I have family and genealogical ties to Mauna Kea. I was an Office of Hawaiian Affairs Trustee from 1986 to 1990. I am a Hawaiian Subject, and participate in a state administrative hearing under duress. I have been involved in traditional and customary Native Hawaiian cultural, religious and spiritual practice since the early 1980's. I have traversed the trails leading to, over and around Mauna Kea. I am a member of the kalai wa'a (canoe building) community, with special ties to Keanakeko'i (adze quarry) found atop Mauna Kea. I work with and gather traditional wood, fiber, and stone material related to kalai wa'a (canoe building) and other cultural works. I also collect sacred waters from various sources, including the springs of Mauna Kea, for ritual and medicinal purposes. I have spent years working for the protection of and the propagation of endemic (to Hawai'i and Mauna Kea) plant species.

Over the last several years I have lead the Mauna Kea Huaka'i and group of Hawaiian and non-Hawaiian people, across the island east-west and north-south from the shoreline to the summits of Mauna Kea and Mauna Loa, around the summits and back to the sea level shore again. On the Huaka'i we have conducted traditional and customary cultural, spiritual and religious rites and ceremonies at locations including Lake Waiau, the various springs and Pohakuloa gulch areas.

I have interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, separate from those interests held by the general public and can provide relevant information to help decision-making regarding the Universities "Comprehensive Management Plan" (UH CMP). In order to help expedite the contested case hearing process, I am willing to work with any other parties so that where common and shared interests between parties exist we will to work to file jointly.

I have been actively involved in natural and cultural resources protection of Mauna Kea since the 1980's and I continue to exercise traditional and customary Hawaiian cultural, spiritual and religious practice. Furthermore, I was granted standing by BLNR in a previous contested case hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. I was also a Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

I exercise, have exercised, and desire to continue to exercise traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas. These rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making and other crafts, depositing of the “piko” or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, I, along with other Native Hawaiians enjoy constitutionally protected traditional and customary native Hawaiian rights.

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP and HB 1174 will impact land uses within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights include, but are not limited to:

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the “piko” or umbilical cord, and water collection in and from Lake Waiau;
- Traditional astronomy, cosmology, and navigation;
- Burial practices;

- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of kinolau images.
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area
- Trails, access and use

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR's jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

Trail System and the Highways Act of 1892. In 1892, Queen Lili'uokalani approved law that determined that the ownership of all public highways and the land, real estate and property of the same shall be in the Hawaiian Government in fee simple. The definition of public highway, includes all existing trails at the time "or hereafter opened, laid out or built by the Government, or by private parties, and dedicated or abandoned to the public as a highway, are hereby declared to be public highways. Furthermore, "All public highways once established shall continue until abandoned by due process of law". (HRS §264-Ub) The following HRS furthers the intent of the Highways Act: All trails and other nonvehicular rights-of-way in the State declared to be public rights-of-way by the Highways Act, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at anytime hereafter, or in the future, as declared to be public trails. A public trail is under the jurisdiction of the State Board of Land and Natural Resources – unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county. All State trails once established shall continue until lawfully disposed of pursuant to Chapter 171, HRS. (see also HRS §264-1 Public highways and

trails) http://www.capitol.hawaii.gov/hrscurrent/vol05_Ch0261_-0319/HRS0264/HRS_0264-0001.HTM 9/19/2006

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising the private use of public trust lands, and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The UH failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) of the UH CMP.

The Wekiu. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP under review and adopted in by BLNR reference another UH BOR document called the UH 2000 Master Plan (UH 2000 MP). This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the BOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH CMP includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the CMP will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action

temporary or by breaking it down into small component parts," id. § 1508.27(b)(7);

- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," id. § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b) (10).

9. The specific disagreement, denial or grievance with the above matter:

Traditional and Customary Rights of Hawaiians. Approval of the UH CMP will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP grants the UH and their designated agents the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. I seek to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. To date the summit site built by ROOK I has been desecrated and destroyed at least two times in all, the latest of which occurred just this year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting. The BLNR has a statutory and

constitutional obligation to protect the watershed resources of Mauna Kea. I have spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. I have spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of our traditional and customary cultural and religious practice.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently accessed impacts, or to reduce or mitigate these impacts. I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of my and other Hawaiians cultural and religious practice.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a

comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. "Carrying capacity;"
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

10. Outline of specific issues to be raised:

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed)?
- b. Whether BLNR unlawfully voted to approve the UH CMP after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings in Hilo prior to decision making (4/8/09-4/9/09)? Whether BLNR's approval violated both DLNR's own rules and due process?
- c. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- d. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- e. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- f. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- g. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.

h. Whether the BLNR should have adopted the UH CMP before independently identifying, assessing, and implementing actions to protect constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?

i. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for protecting natural resources of Mauna Kea and, particularly, for any observatory expansion beyond the observatory limits set in BLNR 1983-85 Management Plan? The 1983-85 Management Plan set a limit on the size, dimensions, and number of observatories and telescopes permitted atop Mauna Kea (i.e. carrying capacity of the Mauna Kea).

j. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.

k. Whether the BLNR improperly approved the UH CMP that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

11. Outline of basic facts:

The record in this matter to date is contained in the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 (appeal dismissed), and public documents on record in this proceedings. Those records are incorporated by reference here.

In brief, the expanded development and operation of Mauna Kea observatories at the summit have led to continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and destroyed cultural sites. UH agents (called UH "ranger" have harassed myself and members of Huaka'i group while we were camping along the

road side and even went so far as to photograph us while sleeping) The failure to genuinely prepare a master plan and to restrict and manage activities on Mauna Kea has led to, and will in the future lead even further to, an overuse and loss of the unique natural and cultural resources on the mountain

The CMP and UH bill (HB1174, SD2) are poorly conceived and inadequate efforts to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The January 2009 UH CMP is not such a plan. Nor can an ad hoc collection of "sub-plans" remedy its failure. There is no substitute for an integrated and fully considered plan. The CMP now before the Board must be rejected.

12. The relief or remedy to which you seek or deem yourself entitled:

That the DLNR:

- a) REJECT AND NOT APPROVE OR ADOPT the January 2009 UH CMP;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;

OR IN THE ALTERNATIVE,

- c) GRANT Petitioner CLARENCE KUKAUAKAHI CHING standing in this proceeding and CONDUCT a full contested case hearing on the proposed CMP

I wish to thank you for your time and consideration,
I Aloha I remain,

Clarence Ching
Clarence Kukauakahi Ching

DATED: Hilo, Hawaii, April 17, 2009

Check # 1159 attached